

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTOR ENRIQUEZ-FRANCO

Claimant

VS.

**BORDNER ROOFING CO. a/k/a
BORDNER HUMAN RESOURCES CO.
and JOSE LARA ROOFING**

Respondents

AND

**MIDWEST EMPLOYERS CASUALTY CO.
and INSURANCE CARRIER UNKNOWN**

Insurance Carriers

Docket No. 1,041,166

ORDER

Claimant appealed the September 11, 2008, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

This is a claim for a February 13, 2008, accident that occurred in Missouri. In the September 11, 2008, Order, Judge Hursh held claimant failed to prove the alleged contract of employment was formed in Kansas. Accordingly, the Judge concluded there was no jurisdiction under the Kansas Workers Compensation Act.

Claimant now requests the Board to reverse the preliminary hearing Order and find jurisdiction. Since the respondents do not agree that claimant's contract of employment was made during an early February 2008 telephone conversation between claimant and Jose Lara, who was in Mexico at the time, claimant contends the employment contract was not formed until claimant went with Mr. Lara's sons and nephew on February 12, 2008, to pick up roofing materials for their next job. And because that trip started at Mr. Lara's home in Kansas City, Kansas, and because Mr. Lara's sons and nephew were allegedly Mr. Lara's agents, claimant contends his contract of employment was formed in Kansas.

Conversely, the respondent Bordner Roofing Co. a/k/a Bordner Human Resources Co. (Bordner) contends the preliminary hearing Order should be affirmed. Bordner argues that the last act of the employment contract, if one was ever created, occurred either in Mexico or Missouri.

Jose Lara did not file a brief in this appeal and, therefore, the Board assumes he would request the Board to affirm the September 11, 2008, Order.

The only issue on this appeal is whether the evidence proves claimant's alleged contract of employment with Jose Lara was formed in Kansas. If not, claimant's accident does not fall under the jurisdiction of the Kansas Workers Compensation Act.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned finds:

Claimant has worked as a roofer for six or seven years and has worked in the Kansas City area for part of that time. Claimant testified in early February 2008 he telephoned Jose Lara about living in Mr. Lara's house and coming to work for him. At the time of that telephone conversation claimant was in Kansas and Mr. Lara was in Mexico. Moreover, claimant testified Mr. Lara did not ask claimant to come work for him but, instead, claimant told Mr. Lara that he was going to work for him. Regarding that conversation, claimant testified, in part:

Q. (Mr. Herdoiza) Did [Mr. Lara] tell you he needed another worker?

A. (Claimant) No.

Q. Well, didn't he ask you to come work for him?

A. No.

Q. He didn't ask you to come work with him?

MR. FOWLER: Asked and answered, your Honor. He didn't like the answer but he still answered it.

THE COURT: That's true. Just putting a different emphasis on the words isn't going to change anything.

A. He didn't ask me but I told him.¹

Sometime after that telephone conversation, claimant moved into Mr. Lara's house.

At the time of the telephone conversation claimant was working with another roofer, Delfino Paisano. On February 12, 2008, after claimant had stopped working for Mr. Paisano, claimant went with Mr. Lara's roofing crew to Bordner's office to pick up a work order. The next day claimant accompanied the roofing crew to a job site in Missouri, where he fell while working on a roof.

Mr. Lara disputes claimant's version of their telephone conversation. According to Mr. Lara, they only talked about claimant moving into Mr. Lara's house and they did not talk about working for him. Moreover, Mr. Lara testified that he did all the hiring for his roofing crew.

The Judge found claimant failed to prove he accepted an offer of employment in his conversation with Mr. Lara. The undersigned agrees. Based on claimant's testimony, the undersigned finds Mr. Lara did not offer claimant employment in their telephone conversation in early February 2008. Accordingly, the evidence fails to establish that claimant accepted an offer of employment in that conversation.

CONCLUSIONS OF LAW

The only issue on this appeal is whether claimant has established that his contract of employment with Jose Lara was formed in the state of Kansas.

The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974).²

Claimant has failed to prove he was offered or accepted employment in his conversation with Mr. Lara. Claimant specifically testified Mr. Lara did not offer him employment in their early February 2008 telephone call. Assuming claimant's version of

¹ P.H. Trans. at 21, 22.

² *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

the facts is true, claimant's statements to Mr. Lara comprised an offer to Mr. Lara. And any acceptance by Mr. Lara would have occurred in Mexico.

In his brief to the Board, claimant argues the last act of the alleged employment contract's formation did not occur during the parties' telephone conversation because the contents of the conversation are disputed. Rather, claimant argues Mr. Lara's sons and nephew were his agents and, therefore, they contracted with claimant on Mr. Lara's behalf. The undersigned disagrees. The evidence does not establish that Mr. Lara's sons and nephew were his agents. Indeed, Mr. Lara testified he was the only person who hired workers for his roofing crew and that testimony is uncontradicted.

In short, the undersigned finds claimant has failed to prove he entered into an employment contract with Mr. Lara in the state of Kansas. Accordingly, the undersigned affirms the Judge's determination that claimant's February 13, 2008, accident in Missouri does not fall within the jurisdiction of the Kansas Workers Compensation Act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the September 11, 2008, Order entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of November, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Brian J. Fowler, Attorney for Bordner and Midwest Employers Casualty Co.
Jose Lara, Jose Lara Roofing, 302 S. Boeke St., Kansas City, KS 66101-3723
Kenneth J. Hursh, Administrative Law Judge

³ K.S.A. 44-534a.